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May 2011

New Challenges Faced as Support of Veterans' Employment Rights Ramps Up

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Meeting a primary objective of Director Patricia Shiu's initial regulatory agenda, on April 26, 2011, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") published a Notice of Proposed Rule Making (the "Proposed Regulations") substantially rewriting, and materially increasing the obligations of federal contractors to take affirmative action to employ and to advance in employment qualified protected veterans. 76 Fed. Reg. 23,358 (April 26, 2011). [See the proposed regulations here](#). The most dramatic change is the requirement that contractors seek veteran status information from applicants and use a numerical analysis to determine whether they are hiring veterans at the expected or planned level. Other changes include: a radical expansion of the outreach requirement, a lengthening of the record retention period to five years, and a potential elongation of the temporal scope of a desk audit beyond that set forth in a scheduling letter. All in all, the Proposed Regulations, if not modified as a result of the notice and comment period, will make the affirmative action obligations with respect to veterans much more akin to those governing women and people of color, as opposed to the largely aspirational requirements with respect to the employment and advancement of veterans in the current regulations.

There is a 60-day comment period for the Proposed Regulations, ending on June 27, 2011. We will keep you informed about developments with respect to the Proposed Regulations and are available to discuss their potential consequences and strategies to achieve compliance even as we await their final form.

History

The OFCCP is charged with monitoring and enforcing a contractor's obligations with respect to veterans, as legislated in the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §4212 ("Section 4212"), and more recently the Jobs for Veterans Act of 2002. Pub. L. No. 107-288, 116 Stat. 2034. The regulatory framework regarding a contractor's obligations with respect to veterans, as well as the OFCCP's enforcement of those obligations, has generally remained the same since 1976. See 41 CFR Parts 60-250 and 60-300.

Throughout most of those 30 years, the OFCCP's enforcement of compliance with the existing veterans' regulations was far less aggressive than its enforcement of the regulations which impact women and minorities, 41 CFR Parts 60-1 and 60-2. This changed when the Obama Administration took office. The Administration, led in these efforts by Director Shiu, began stepped up enforcement of the existing veterans regulations. The Administration's Proposed Regulations will impose even more onerous obligations on federal contractors and subcontractors with respect to employment and advancement of protected veterans.

The Proposed Regulations would require:

Earlier and More Aggressive Veteran Self-Identification Requirements

For the first time contractors must solicit applicants to self-identify their status as a protected veteran. A contractor must also solicit new hires and provide incumbent employees who previously declined to self-identify the opportunity to self-identify. (*Proposed* Section 60-300.42(b)) To add a layer of confusion, the proposed self-identification requirements differ for applicants and new hires:

- *Applicant Solicitation:* Applicants must be invited to self-identify as a protected veteran, without identifying the specific veteran category.¹ (*Proposed* Section 60-300.42(a))
- *New Hire:* After an offer is made, the new hire must be provided the option of identifying as a protected veteran in the relevant categories, of electing not to self-identify as a protected veteran, or of self-identifying as protected without disclosing to which of the protected categories he or she belongs.

The Proposed Regulations included model self-identification forms. (*Proposed* Appendix B) Contractors must be attuned to the intricacies of these proposed new self-identification requirements. Further, the self-identification regulations may impose on employers additional obligations to accommodate veterans with disabilities. The Proposed Regulations provide that if an applicant self-identifies as a disabled veteran, the contractor “must inquire . . . whether an accommodation is necessary.” (*Proposed* Section 60-300.42(d)).

New Mandatory Data Collection and Analyses: Requirement to Benchmark Veteran Hiring

Although data collection and analysis has always been required with respect to a contractor’s affirmative action program for women and minorities, no such requirements existed with respect to veterans or individuals with disabilities. The Proposed Regulations change that. A contractor will be required to document and maintain the following computations/comparisons with respect to applicants and hires on an annual basis: (*Proposed* Section 60-300.44(k))

- Number of priority referrals of protected veterans received from the appropriate state work force agency or job bank, identified as an Employment Service Delivery system (ESD),
- Number of total referrals received from ESDs,
- Ratio of priority referrals of veterans to all referrals (the “referral ratio”),
- Number of applicants who self-identified as a protected veteran,
- Total of number of job openings and total number of jobs filled,
- Ratio of jobs filled to job openings,
- Total number of applicants for all jobs,
- Ratio of protected veteran applicants to all applicants (the “applicant ratio”),
- Total number of applicants hired, and
- Ratio of protected veterans hired to all hires (the “hiring ratio”).

Although not identified as an adverse impact analysis, the data and analysis required under the Proposed Regulations would provide sufficient information to permit the OFCCP to allege discrimination in the hiring of veterans based on numerical comparisons.²

Utilizing the above analysis, as well as the evaluation of the effectiveness of its outreach efforts, a contractor must establish annual benchmarks “to measure its progress to achieving equal opportunity for protected veterans.”³ (*Proposed* 60-300.45)) While the Proposed Regulations recognize that the “effectiveness” of outreach efforts is not easily defined, and allow a contractor some flexibility, a contractor would be required to consider the number of protected veteran referrals, applicants, and hires for the prior three years in evaluating its efforts, and document all other criteria it uses to evaluate effectiveness. As noted in the commentary to the Proposed Regulations, “the primary indicator of effectiveness is whether qualified veterans have been hired.” 76 Fed. Reg. at 23,377. This requirement, which is similar (but clearly not identical) to the goals established for the hiring of women and minorities, will require a contractor to establish hiring benchmarks on an annual basis, expressed as a percentage of total hires that will be protected veterans.

In establishing these benchmarks, a contractor will take in to account:

- Bureau of Labor Statistics data and data maintained by the state employment systems (both of which will be published on the OFCCP website); (*Proposed* 60-300.45(b)(1,2)),
- The contractor’s referral, applicant, and hiring ratios, and its assessment of its outreach, and
- Any other factors such as the nature of the job openings or their location.

The benchmarks established by a contractor must be documented, including the analysis that led to their development. (*Proposed* 60-300.45(c))

Proposed Changes to Required Outreach Efforts to Veterans

The Proposed Regulations would require that contractors undertake significant and targeted outreach and recruitment efforts with respect to veterans. Contractors would be required to:

- Establish “linkage agreements”⁴ with the local veterans’ employment representative in the employment service office nearest the establishment;
- Establish a linkage agreement with at least one of five other enumerated veterans’ organizations; (*Proposed* Section 60-300.44(f)(1)(i)), and
- Consult the National Resource Directory and establish a linkage agreement with one or more of the veterans organizations listed in that Directory.⁵ (*Proposed* Section 60-300.44(f)(1)(ii))

The Proposed Regulations would also create additional obligations for contractors to list employment openings with the ESD (the appropriate state work force agency or job bank). Compliance with this listing requirement will likely be reviewed during a compliance evaluation. Further, the ESD must provide priority referral of veterans to federal contractors. (*Proposed* Sections 60-300.5(a)-(2) and 60-300.84)

In addition to mandating new and more stringent external outreach efforts, the Proposed Regulations also include new mandatory procedures for communicating the contractor’s affirmative action efforts with respect to protected veterans to its incumbent work force. (*Proposed* Section 60-300 (g)) Thus, a contractor must:

- Include its affirmative action policy in its “policy manual,”
- Schedule annual meetings with “all employees to discuss its affirmative action policies, explain contractor and individual employee responsibilities under these policies, and identify opportunities for advancement;”
- Conduct meetings with executive, management, and supervisory personnel to explain the intent of the policy, “making clear the chief executive officer’s attitude,” and
- Discuss the policy “thoroughly” in any orientation and management training programs.

Enhanced Powers to Evaluate Contractor Compliance

In response to a recent decision, *see OFCCP v. Frito-Lay, Inc.*, No. 2010-OFC-00002 (DOL ALJ) (July, 23, 2010) (appeal pending), in which an Administrative Law Judge prohibited the OFCCP from obtaining data or information subsequent to the time period set forth in the scheduling letter, the Proposed Regulations make it clear that “OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this Part.” (*Proposed* Section 60-600.60(a)(1)(i)) The Proposed Regulations also provide that it is now in the agency’s sole discretion whether it will review requested data or information off-site or on-site; previously the contractor had the discretion to make that choice. (*Proposed* Section 60-300.60 (a)(3)) Finally, the Proposed Regulations require a contractor to specify all formats in which its records are available, and provide such records in the format requested by the OFCCP. (*Proposed* Section 60-300.81)

Miscellaneous Proposals

There are numerous other technical changes in the Proposed Regulations, including the following:

- The poster obligation is clarified (*Proposed* 60-300.5(a)(10)):
 - The obligation is to applicants and employees as before,
 - Accessibility of the notice is added—visual accessibility for those in wheelchairs; Braille or large print for the visually challenged,
 - Electronic posting conspicuous on an intranet or emailed to employees, and
 - Electronic posting for applicants if the contractor uses an electronic application process.
- The EEO tag line will need modification (*Proposed* 60-300.5 (13)):
 - Solicitations or advertisements must state non-discrimination as to protected veteran applicants.
- The Contract “flow down” clause will have to be included “verbatim” in subcontracts and purchase orders, regardless of whether the subcontract or purchase order is related to a primary federal contract (*Proposed* Section 300.5(d)).⁶

- Recordkeeping
 - The retention period is 5 years for the documentation of outreach efforts and the determination of their effectiveness, the calculation of all “ratios” and the establishment of benchmarks.
- Mandatory training will be required (*Proposed 60-300.44(j)*)
 - Training is to include the benefits of employing veterans, sensitivity, and legal responsibilities, and
 - Documented in contemporaneous records as to subject, trainer, attendees, time of training.

Implications for Contractors

If made final in their current form, the challenges to contractors will be daunting. For example, the new record keeping requirement will likely create the need to modify HRIS and Applicant Tracking Systems. Such technology modifications are often costly, time-consuming, and difficult to implement, and the interval between the finalization of the Proposed Regulations and their effective date is not known. The tracking of referrals from organizations that are parties to linkage agreements, which could number in the dozens or even hundreds for contractors with establishments in multiple regions, may require additional headcount, in addition to new technology. The focus on hiring veterans may also create analytic burdens: how does a contractor deal with the obligation to hire veterans (presumably a predominantly male group) and the obligation to conduct adverse impact analysis of the hiring of women? The risks of the OFCCP finding discrimination with respect to veterans will also increase as a result of the new and extensive data that a contractor must maintain and provide upon request.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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- ¹ The Proposed Regulations generally carry over the same four protected categories in the Existing Regulations: disabled veterans, recently separated veterans, Armed Forces service medal veterans, and “active duty wartime or campaign badge veterans” (the former category of “other protected veterans”). In addition, the former terminology of “covered veterans” will be discarded in favor of “protected veterans.” The Proposed Regulations do not impact the VETS-100 form, which is administered by the Department of Labor’s Veterans’ Employment and Training Service (VETS). The OFCCP will work with VETS after a final rule is published to conform the VETS-100A form to the new Section 4212 veterans categories.
- ² The Proposed Regulations do not require the data to be collected or the analysis to be conducted by AAP job group. It may be advantageous to be able to report the data by such job groups in order to better defend against potential claims of discrimination, however.
- ³ The rationale for the need for the Proposed Regulations is premised on the increasing number of veterans returning from duty in Iraq, Afghanistan and elsewhere, as well as on veteran unemployment rates reported by the Bureau of Labor Statistics. 76 Fed. Reg. at 23,358. There is nothing in the Proposed Regulations suggesting that veterans have been discriminated against in hiring based on their status as protected veterans.
- ⁴ A “linkage agreement” is defined as “an agreement describing the connection between contractors and appropriate recruitment and/or training sources. A linkage agreement is to be used by contractors as a source of potential applicants for the covered groups the contractor is interested inThe contractor’s representative that signs the linkage agreement should be the company official responsible for the contractor’s affirmative action program and/or has hiring authority. (Proposed Section 60-300.2 (p))
- ⁵ In addition, the Proposed Regulations would require that a contractor send written notification of its policy related to affirmative action toward protected veterans to subcontractors, including subcontracting vendors and suppliers. (Proposed Section 60-300.44 (f)(1)(iii)) This obligation is in addition to the “flow down” requirement discussed below.
- ⁶ The proposed regulations to implement Executive Order 13496 (requiring federal contractors to provide notice of employees’ labor law rights) also included flow down language that was to be included verbatim in all subcontracts and purchase orders. That proposed requirement came under heavy criticism from the contractor community and it was abandoned in the final rule in favor of the clause being incorporated by reference, as is permitted with the contract clause under Executive Order 11246. Perhaps this requirement in these Proposed Regulations will have a similar fate.